ALASKA MINERS ASSOCIATION, INC.

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December 13, 2001

Mr. Randy Bates
Division of Governmental Coordination
Office of the Governor
P.O. Box 110030
Juneau, Alaska 99811-0030

Re: Comments on Draft Proposed Alaska Coastal Management Program Implementation Regulations

Dear Mr. Bates,

This comment letter responds to the October 1, 2001 (second) draft of the proposed Alaska Coastal Management Program (ACMP) Implementation Regulations. The Alaska Miners Association (AMA) appreciates that this regulation review and modification process has been in progress for more than two years and that various beneficial changes have been proposed in the current draft. However, these regulations, as now proposed, continue to be un-workable and require significant additional changes if they are to go forward and survive legal challenge.

General Comments

The regulations being proposed will not correct many of the serious and substantive problems that exist in the current regulations. Under the proposed regulations: in many instances it is not possible to determine whether the ACMP applies to a specific project; it is not possible to define the specific steps that a project must follow to obtain a consistency determination; it is not possible to determine the amount of time the consistency determination will take.

In several instances the proposed regulations seek to merely codify existing illegal practices that have been wrongly used by the Division of Governmental Coordination (DGC) over the past many years. One particular and most egregious example being the use of so-called "homeless stipulations," called "alternative measures" in the draft regulations. It has been common practice for DGC to impose requirements during consistency determinations that do not have legal authority within any of the individual resource agencies. However, such "homeless stipulations" have been forced upon the project owner if the owner is to obtain a consistency determination and oftentimes the project owner was thereby blackmailed into stipulations for which there was no legal basis. The draft regulation would codify this illegal practice.

The current draft is a significant step backward. In addition to codifying illegal requirements it proposes a dysfunctional permitting scheme that includes all manner of "flexibility" and "discretion"

for DGC which translates into uncertainty, increased permitting time and increased cost for the regulated public. The regulations must have consistency, predictability and objectivity. This proposal has none of these attributes and it even decreases these attributes.

It was the intent of the Legislature that the ACMP process would provide procedural coordination across existing resource agency permitting authorities as they apply to projects having a significant and direct impact on coastal areas. We support this intent of the ACMP as a coordinating function. However, our experience is that this coordination function has been overshadowed by by lack of certainty, lack of clear applicability, lack of predictable schedule, and imposition of unlawful conditions, i.e. the "homeless stipulations".

The gravity of these proposed regulations for the mining industry must not be underestimated. Many of our members are small businesses which do not have legal and permitting staff that can negociate their way through these regulations. For all the regulated public, but especially for such small businesses, the ACMP regulations have historically been a major source of permitting difficulty and concern. The proposed regulations would both perpetuate the existing problems and even expand the problems for these small businesses.

The AMA has participated in various meetings and workshops leading to the current draft and has worked closely with other organizations including RDC and AOGA and various companies. The AMA participated in development of and fully supports the changes recommended in the 12/13/01 comment letter submitted by the Alaska Oil & Gas Association (AOGA). We request that ATTACHMENTS 1 and 2 of that letter be considered part of this AMA comment letter as well.

Specific Comments

1. Applicability to a Specific Project

It is not possible in many instances to determine whether the ACMP applies to a specific project. The proposed regulations do not allow a clear determination of applicability. There are several aspects to this problem.

First, the proposed regulations create significant confusion by addressing applicability in four different sections using different language. Addressing applicability in numerous sections is an invitation for confusion and problems. Subsections 50.025, 50.200, and 50.230 should be eliminated and applicability should be addressed only in subsection 50.005.

Second, the use of language limiting consistency reviews to projects subject to "a state agency authorization identified under 6 AAC 50.750" is an improvement. This reference to activities specifically identified on the "C" list will reduce ambiguity, provide clearer notice, and avoid unnecessary litigation concerning when a consistency review may be required. However, merely referencing the "C" list is not sufficient. The "C" list should be included specifically as part of the regulation.

Third, the applicability standard contained in subsection 50.005 is significantly broader and less certain than was intended by the Alaska Legislature when it enacted the ACMP. As indicated by the statutory language, the Legislature intended the Program to address "direct and significant impacts" upon coastal resources. This is in direct conflict with an activity that "*may affect* any coastal use or resource" (see proposed 50.005(a)) or an activity that "*may have* a reasonably foreseeable direct or *indirect effect* on any coastal uses or resources," (see proposed 50.750(a)).

The Alaska Coastal Management Act specifically provides in Section 2. LEGISLATIVE POLICY. It is the policy of the State to:

> (2) encourage coordinated planning and decision making in the coastal area... involving the use of resources *which have a direct and significant impact upon the coastal land and water of the state;*
>
> (3) develop a management program which sets out policies, objects, standards and procedures to guide and resolve conflicts among public and private activities involving use of resources *which have direct and significant impact upon the coastal land and water of the state.*

To conform with this statute, any reference in the regulation must include only those activities "*which have a direct and significant impact upon the coastal land and water of the state.*" Anything beyond this is an illegal application of the law.

Fourth, the applicability standard should be limited geographically to projects that are located within the coastal zone. The original coastal zone boundaries mapped by the Coastal Policy Council were based upon the biological and physical relationships of the marine and terrestrial environments. [In most states, the inland extent of this boundary is limited to 1000 feet.] The Legislature intended that only projects in this area would be subject to consistency review. Because projects outside the coastal zone, by definition, do not have direct impacts on coastal resources, consistency review is not required for these projects. This definite and objective standard will prevent confusion and indecision over applicability issues which has haunted applicants in the past.

Fifth, applicability cannot be determined and is not certain for a project that may include both true coastal areas and other areas further inland or activities or combinations of activities not specifically listed. The relevant question in regarding 6 AAC 50.025 is, "How much of a project is subject to consistency determination?" The proposed regulation cannot answer this question because it does not include a legal standard for determining the scope of review. The regulation requires consultation, which may produce an agreement on applicability, but it fails to provide a legal standard which is needed for controversial projects.

Also, an applicant cannot determine which parts of a project are subject to consistency review and a reviewing agency must exercise unguided discretion to determine the scope of that review. An objective standard will create predictability. To not correct this problem would codify an arbitrary process.

The current draft of 6 AAC 50.700 provides that activities otherwise exempt from consistency review are brought back into the ACMP process if they are part of a larger project subject to

consistency review. The effect of this provision is to render the "A" and the "B" lists useless in most circumstances. Rather than provide for these important general and categorical exceptions and then eliminate virtually all the practical benefits, the exemption should be maintained for these activities when they are part of a larger project (which is most frequently the case).

2. Steps to Obtain Consistency Determination

It is not possible to define the specific steps that a project must follow to obtain a coastal zone consistency determination. Various persons have attempted to develop a flow chart or decision tree from the proposed regulation but thus far everyone has been unsuccessful in that attempt. For this regulation to not provide the regulated public with this very basic guidance is arbitrary and capricious.

3. Time to Obtain a Consistency Determination

It is not possible to determine the amount of time it will take to obtain a consistency determination.

The following comments apply to items 2. and 3. above.

The section in the proposed regulations addressing 1) the application submittal, and 2) the start of the review period, are two instances where the specific steps and the time cannot be determined. There is no deadline for a determination of completeness. (See 6 AAC 50.225(a)). Also, there is no deadline for publication of the public notice which begins the processing clock. (See 6 AAC 50.240(c)). Further complicating the schedule, the start day can be negotiated among the state agencies creating further delays. (See 6 AAC 50.240(a)). The result is that an applicant cannot even make an educated guess as to when the clock might begin to run, let alone when it will end.

When the clock does start, the reasons for schedule modifications in 6 AAC 50.280 are many and always at the discretion of the coordinating agency. The most bizarre reason of all for changing the schedule is due to the ability of DGC to extend the schedule indefinitely for "complex issues" (see 6 AAC 50.280(7)). What are "complex issues"? Does this phrase actually mean "controversial issues" or "politically hot issues"? The same indefinite extension can be invoked to accommodate the schedule for other state authorizations. (See 6 AAC 50.280(4),(5)).

The ACMP process must not be designed solely for the convenience of (or, rather, to avoid inconvenience to) the coordinating and resource agencies at the expense of efficiency, predictability and fairness to the regulated public. The draft regulations institutionalize greater uncertainty as the process becomes more "complex" where there is a very practical need for greater certainty for all interested parties.

4. The Elevation and Petition Processes

The elevation and petition processes are another area lacking certainty and schedule discipline.

Again, we were unable to prepare a flow chart or decision tree illustrating the steps and the associated timelines for these processes. The two-tiered elevation process is overly cumbersome and elevation to the director level should be eliminated. Projects that warrant director-level review can be readily identified during the review process by the controversy they inherently generate between the resource agencies, the public, and the applicant. The staff, or anyone else through the public comment process, can request the directors' participation in the proposed consistency determination for such a project without the need for a formal elevation. This will shorten the process, diminish confusion, increase clarity and provide more predictability for applicants. It will also eliminate the need for a petitioner to submit its petition twice - once after the initial proposed consistency determination and again after a director-level elevation. This change alone will greatly simplify the process by creating a linear progression through the steps of, first, a petition and, second, an elevation.

In other respects, the draft regulations conflict with state law. For example, state law requires a decision on a petition to be made within 30 days of receipt of the petition. AS 46.40.096(e). Yet, it is literally not possible under the draft regulations to complete the process in 30 days. The regulation must therefore be changed to comply with the statute.

Even with modification of elevations to a one-tiered process, the absence of any specified procedures for conducting elevation meetings and petition hearings is a serious defect. It is not clear whether elevation proceedings are to occur on the record or whether new evidence can be presented. It is also not clear how evidence is to be submitted, whether it will be only written or whether live testimony may be presented. It is not stated what evidentiary standard applies and whether an opportunity for cross-examination will be provided.

The elevation rules allow any person to participate in the agency meeting that is the core of the elevation process. This should be limited to the applicant. Further, significant internal inconsistencies are found in the petition process and the proposed regulations regarding acceptance and rejection of petitions are incomprehensible.

5. Homeless Stipulations

These newly renamed "alternative measures" which have become known over time as "homeless stipulations" remain homeless and illegal. The proposed regulations require that consistency determinations "include any alternative measure determined to be necessary to ensure the project is consistent with an enforceable policy." (See 6 AAC 50.260(g)(2)). An alternative measure is then circularly defined as a requirement necessary to ensure consistency and is distinct from a "condition," which is a requirement necessary to satisfy a resource agency's requirements but may also ensure consistency. (See 6 AAC 50.990(4) and (11)). Simply stated, a condition is a requirement a resource agency is authorized to impose, and an "alternative measure" is a requirement that no agency is authorized to impose. Nonetheless, the proposed regulations require that state resource agencies incorporate any "alternative measures" attached to a consistency determination into the agency authorizations required for the project. (See 6 AAC 50.260(g)(5) and 50.275(b)). The resource agencies are prohibited from issuing any permits or authorizations prior

to receiving a final consistency determination so that alternative measures can be incorporated into agency permits. (See 6 AAC 50.275 (a)).

Through these and other provisions that incorporate the same concepts, the draft regulations again reflect a very fundamental misperception of Legislative intent and a misapplication of basic legal principles in attempting to codify the so-called "homeless stipulations" - now being renamed "alternative measures." Explained as creating a "networked" system, the proposed regulations bar the issuance of state permits until after the consistency determination is final. This convention attempts to legitimize "homeless stipulations" by delaying project permitting so that DGC may force the adoption of conditions no agency is authorized to impose by attaching them as provisions of other state permits. In doing so, the proposed regulations effectively convert a consistency determination into a "permit" process that the Legislature clearly intended to avoid. This unlawful concept infects much of the draft regulations.

Nothing in Chapter 46.40 AS authorizes the Council, DGC, or any other governmental entity, to impose permit conditions to ensure consistency with the ACMP. Nor can that statute be construed to imply such authority to accomplish its purpose. Rather, the Legislature has authorized the Council to adopt regulations establishing a consistency review and determination *process* within certain guidelines set forth in the statute.

To the extent that the final rule attempts to create substantive conditioning authority, such provisions are invalid. Powers v. State, Pub. Employees' Retirement Bd., 757 P.2d 65, 67 (Alaska 1988) (regulations which exceed agency's statutory authority are invalid); Muller v. BP Exploration (Alaska) Inc., 923 P.2d 783, 792 (Alaska 1996) (regulations which differ substantively from clear language of statute are invalid). Similarly, the requirement that the conditions (alternative measures) be attached to other state agency authorizations even if the authorizing agency has no authority to impose such a condition exceeds that agency's statutory authorization and is also illegal.

In adopting Chapter 46.40 AS, the Alaska Legislature made a policy decision not to create a new permitting process, but rather to use existing resource agencies and their authorities to implement the ACMP. The Legislative Policy statement from the original Act demonstrates that the Legislature did not intend to expand existing permitting authority

Furthermore, the Legislature has specified in AS 27.05.010 that the Department of Natural Resources is the lead agency in permitting mining operations. DGC therefore has a significantly more restricted "coordination" roll when mining operations are the topic. This statute was instituted after the Alaska Coastal Management Act because of difficulties DGC was having with mining projects and was passed to address these difficulties.

6. Boundaries of Coastal Districts

Although beyond the scope of the current draft regulations, it is important to note that the current boundaries of some coastal districts are illegal. As discussed previously, the Alaska Coastal

Management Act specifically limits the ACMP to resources *"which have a direct and significant impact upon the coastal land and water of the state."* Also as noted above, in most states this is limited to 1000 feet inland. This limitation must be addressed in the future.

Conclusion

The proposed regulations are totally unworkable. From the proposed regulations it is impossible to determine whether the ACMP applies to a specific project; it is impossible to define the specific steps that a project must follow to obtain a consistency determination; it is impossible to determine the amount of time the consistency determination will take. Possibly the most egregious aspect of the proposed regulations is the attempt to codify the illegal procedure of including "homeless stipulations" that are not allowed by law. These proposed regulations must be scrapped and rewritten to be workable and legal.

Sincerely,

Steven C. Borell, P.E.
Executive Director

enclosures: AOGA Attachments 1 & 2 by reference

cc: Commissioner Pat Pourchot
Commissioner Michele Brown
Commissioner Frank Rue
Senator Gene Therriault